FOR ARGUMENT

No. 88-1597

Supreme Court, U.S.
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12/7 Motion Pending

IN THE

Supreme Court of the United States

October Term, 1989

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent,

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing; Matt Schulz; Ingrid Kimmons; Jason Brone; Jennifer Waggoner; and Allison Wells,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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SUMMARY OF ARGUMENT

This case requires the Court to interpret the Equal Access Act. That task is difficult enough without the additional burden of Respondents' misrepresentations of the factual record.

1. WHS refuses to incorporate any ideological groups into its club program. Respondents' claim that WHS singles out religious speech for adverse treatment has no basis in the record.

2(a). Respondents single out Interact, Zonta, and Peer Advocates as clubs which trigger the Act. Their brief introduces new evidence about Interact and Zonta -- evidence which we are denied the opportunity to challenge -- but this evidence proves little. Thus, although both cite Rotary International's claim that it controls Interact groups as proving that Interact at WHS is noncurriculum related, neither proves

that WHS' Interact was in fact controlled by Rotary, not by WHS, or that Rotary's goals are noncurriculum related.

(b). Peer Advocates, designed to facilitate integration of handicapped students, was not student-initiated [20 U.S.C. §4071(c)(1)] and serves the educational functions of assisting mainstreamed handicapped students and helping other students overcome prejudices about the handicapped.

3. Sponsors give students substantial latitude in running clubs. Contrary to Respondents' suggestion, sponsors nevertheless play a significant role in the operation of the club program, ensuring that clubs provide balance and adhere to WHS' goals and mission. Their absence from the Bible Club (and, therefore, under the Act's nondiscrimination principle, from other noncurriculum

related clubs) would transform WHS' club program.

4. Tinker v. Des Moines Ind. School Dist. and Healy v. James are not dispositive because: (1) Hazelwood School Dist. v. Kuhlmeier teaches that Tinker does not apply to school sponsored speech, or speech which might be mistaken for school sponsored; and (2) unlike Healy, this is not a viewpoint discrimination case.

5. WHS' rules are as specific as rules about "curriculum" can be, given the disagreement as to the meaning of that term. Also, this Court has held that specific written rules are unnecessary as a predicate for curriculum decisions.

6. Respondents, citing popular dictionary definitions, insist on a federal definition of curriculum, cast in terms of academic requirements for graduation. Their definition of

noncurriculum relatedness are so broad that they encompass activities such as school newspapers or athletics, which, even Respondents concede, do not trigger the Act.

Educators do not share a common understanding of "curriculum." Interpreting the Act's references to curriculum to permit local school districts substantial leeway in defining this term reflects this lack of consensus, and is consistent with Congressional intent.

7. The United States insists that curriculum related clubs have a "one-to-one" relationship with a specific course. This position makes sections of the legislative history self-contradictory and limits school officials to a narrow, traditional view of education.

8. Although both Respondents assert that leaving the definition of curriculum

to school officials will undermine the Act, both fail to prove that charge and both are forced to create ad hoc categories of clubs which are arbitrarily exempted from triggering the Act.

9. Although the United States contends that the Act departs from the standards enunciated in Widmar for determining the existence of a public forum, the legislative history does not sustain that view. The United States' inistence that even one non-curriculum related club triggers the Act forces a constitutional question reserved in Widmar -- whether a forum dominated by a religious group would establish religion. Congress, which modelled the Act on Widmar, could not have intended to depart from it in this way.

10. The United States advises WHS to dispense with official sponsorship only for the Christian Bible Club in order to

avoid Establishment Clause concerns. This suggestion is at war with the plainest command of the Act -- nondiscrimination between all noncurriculum related clubs.

ARGUMENT

I

RESPONDENTS' ARGUMENTS CANNOT BE SQUARED WITH THE RECORD

To portray this case as a clone of Widmar v. Vincent, 454 U.S. 263 (1981), Respondents[1] systematically ignore the District Court's factual findings -- findings to which the students make not a single reference. This case, however, should be decided on the basis of its record, particularly the District Court's

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[1] We refer to the individual Respondents as "students". Citations to the Court of Appeals' opinion are to App. Pet. A.___, and to that of the District Court to App. Pet. B.___ .

unreversed findings of fact, not the record as Respondents wish it to be.

A. WHS Has Not Singled Out Religious Clubs For Adverse Treatment

Respondents portray Westside High School ("WHS") as enforcing a rule aimed exclusively at religious clubs. This portrayal forms the foundation for much passionate argument about constitutional protection for religious speech., [Students' Brief at 22-25; U.S. Brief at 41-42, 47]. Much as they might try, Respondents cannot make out this case because WHS has not singled out religious speech for adverse treatment.

WHS' club policy, [Policy 5610, J.A. 488], refuses recognition to any club whose purpose is one-sided advancement of ideological views, whether religious or political[2]. [J.A. 257-58; 313-14]. A religious club fares no differently than

[2] Amici Burr suggests [Brief at 23, n. 35] that Future Business Leaders of America [FBLA] advocates support for the

any other ideological club.

The students are quite simply wrong in insisting [Brief at 5] that school officials would permit informal meetings of unrecognized secular clubs, but not of religious ones. School officials testified that no non-approved clubs could meet on a regular basis. [JA 452-53]. The District Court found [Pet. App. B. 24-26] that the rule was uniformly enforced pursuant to a longstanding, uniformly understood and applied set of unwritten procedures.

The proposed Christian Bible Club was the only ideological club denied recognition only because it was the only ideological club which sought recognition. Indeed, ideological clubs

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free enterprise system. FBLA teaches students to succeed in business. [J.A. 447-448]. That is no more ideological advocacy than teaching spelling would be a rejection of George Bernard Shaw's views on English orthography.

existing in the past were either disbanded or transformed in keeping with school rules.[3] [J.A. 344-345 (Young Republicans/Democrats); 348-349 (Hi-Y); Tr. 476-479]. On these facts, a reasonable student could not reasonably believe that WHS was "affirmatively hostile to religious expression." [U.S. Brief at 16, quoting S.Rep. 357, 98th Cong. 2nd Sess. (1984); Students' Brief at 45].

B. WHS' Clubs Are All Curriculum Related

The District Court credited the school officials' testimony that each club at WHS was curriculum related. App.

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[3] As described in our Opening Brief [pp. 10-11], other proposed clubs were turned down for a variety of reasons, including the "inappropriateness" of one, Dungeons and Dragons. The students attempt to dismiss this denial as solely related to safety concerns [Brief at 5], but, although Dr. Findley's testimony mentioned safety, he explained that the club was turned down because of its general "inappropriateness." [J.A. 367].

Pet. B. 22-23,[4]. Respondents challenge the factual correctness of this finding as to three clubs: Interact, Zonta and Chess. They also argue that Peer Advocates, a club not specifically designated in the pre-trial stipulation as "noncurriculum" related [J.A. 60, ¶17], triggered the Act. [Students' Brief at 27; U.S. Brief at 27].

1. Interact and Zonta Were Not Proved to be Controlled by Non-School Groups

Having failed to persuade the trier of fact that Zonta and Interact were not curriculum related,[5] both Respondents try again in this Court. Both go outside

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[4] The Court of Appeals' rejection of this finding [Pet. App. A 12-14] was not based on a rejection of its factual predicate but on application of an erroneous legal standard.

[5] Whether the Chess Club is subject to a per se rule of noncurriculum relatedness, and whether, if not, WHS' Chess Club was curriculum related, are discussed in our Opening Brief at 56-70, 75-76.

the record[6] to demonstrate that Rotary International and Zonta, the 'parent' organizations of WHS' Interact and Zonta

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[6] The most egregious example of Students' efforts to relitigate this case is Professor David Moshman's amicus brief directed to the issue of impressionability, the very issue on which he testified as the students' paid expert. [J.A. 379-400; Tr. 556]. Contrary to a concession he made at trial that the maturation of young adults is a gradual and uneven process [J.A. 394-45], Moshman's amicus brief states baldly that high school students are as mature as college students [pp. 10-12]. The impropriety is heightened because the attorneys for amicus Moshman appear to be the students' counsel of record's former law firm.

If this Court were the forum to try this case, we would cite a recent study, located through DIALOG, ERIC, File 1, L. Rossow and N. Dort, School Neutrality or Endorsment: Students' Perceptions of Religious Extracurricular Activities, (March 1987), in which high school and college students were questioned as to their respective abilities to distinguish between school neutrality and school endorsement of student religious clubs. The study found high school students substantially less able to make such a distinction than college students. This study suports WHS officials' testimony [J.A. 423-25; 435-37] that WHS students could not make that distinction.

clubs, have "specific philosophic commitments." [U.S. Brief at 29].

Both Respondents imply that Zonta and Rotary International actually exercise control over their WHS affiliates, whose existence, therefore, is said to trigger the Act. [U.S. Brief at 29; Students' Brief at 27]. Confusing religious neutrality with anti-religious animus, see e.g., Engel v. Vitale, 370 U.S. 421, 433-34 (1962), the students assert further [Brief at 27-28] that, by sponsoring a group sharing Rotary's viewpoint, the school has engaged in constitutionally impermissible viewpoint discrimination.

Respondents are not entitled to relitigate their case here since Petitioners are thereby denied an opportunity to challenge their "proof".[7] At least

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[7] Witters v. Washington, 474 U.S. 481, 486, n.3 (1986); New Haven Inclusion

two shortcomings in this proof are immediately apparent. Respondents introduced no evidence on the relationship between the national and local Zonta groups, and, even more, they failed to demonstrate that Rotary's self-serving claim that it "controls" Interact is in fact true with regard to WHS' Interact.

National organizations frequently assert, but do not in fact exercise, control over affiliates. The need for proof of actual control is particularly acute here, because Interact is also controlled by WHS, a closer-to-home entity with far greater ability and authority to control its activities than the putative national sponsor.[8]

Compounding the inadequacies of their belated evidentary submission,

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Cases, 399 U.S. 392, 450, n.66 (1970).

[8] Rotary had little to do with WHS' Interact. School officials testified that WHS' recognition of Interact was not

Respondents wholly fail to demonstrate that the "specific commitments" of Rotary and Zonta are unrrelated to the curriculum.

2. Peer Advocates Does Not Trigger The Act

Peer Advocates was created at the suggestion of a faculty member [J.A. 235; Tr. 275] to "get kids involved in working with handicapped students and to work with them and to become friends with them to understand their handicaps whatever they might be, and to help them feel more a part of WHS." [J.A. 232].

The students suggest that a club is "student initiated," 20 U.S.C.—

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construed by the school or by the students as constituting approval of Rotary International. [J.A. 436-438]. "Interact [was] . . . unrelated, really, to Rotary." [J.A. 438]. Asked "whether [Rotary's creed] is part of the thrust of . . . [Interact]," Dr. Findley responded "I've never seen it if it is, and I've never heard it discussed with kids." He doubted that "you could find kids [in Interact] that would know what that [Rotary Creed] was." [J.A. 288].

§4071(c)(1) if it is begun at the suggestion of students. [Students' Brief at 16]. Having been initiated by a faculty member, Peer Advocates is not a "student initiated" club, as groups triggering the Act must be. In fact, the students' entire case is deficient since they did not prove which, if any, noncurriculum related clubs were begun at the behest of students.[9]

Respondents accurately report the "evil" at which the Act was directed: a

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[9] The legislative history suggests the phrase "student-initiated" was meant to exclude groups controlled by outside adults. 130 Rec. Cong. Rec. 19,218 (remarks of Senator Hatfield); Id. at 19,224 (remarks of Senator Hatfield); Id. at 19,223 (remarks of Senator Hatfield); Id. at 19,236 (remarks of Senator Levin); Id. at 12,239 (remarks of Senator Durenberger); Id. at 19,243 (remarks of Senator Dole).

When our Opening Brief was prepared, the only Congressional Record citations available were to the daily edition. The permanent edition has since become available and is cited in this Reply Brief.

perceived pattern of unjustified discrimination against student religious speech. [Students' Brief at 41; U.S. Brief at 14-16]. Peer Advocates does not serve as a vehicle for student speech. Rather, it serves the institutional needs of the school, needs the United States concedes do not trigger the Act. U.S. Brief at 23, n. 30.

Federal law requires that "to the maximum extent appropriate handicapped children . . . [be] educated with children who are not handicapped." 20 U.S.C. §1412(5). Accord Neb. Rev. Stat. §79-3317. These statutes impose real world burdens on schools, other students, and the handicapped.[10] Peer Advocates eases those burdens, and educates non-handicapped high school students to

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[10] See Honig v. Doe, 108 S.Ct. 592 (1988); Board of Educ. v. Rowley, 458 U.S. 176 (1982); Monahan v. School Dist., 229 Neb. 139, 425 N.W.2d 624 (1988).

overcome their prejudices about the handicapped,[11] [Tr. 275]. It does not trigger the Act.

D. Sponsors Exercised Substantial Authority Over All Clubs

Citing the testimony of fellow students, the students claim [Brief at 35], that "teachers [at WHS] play the role of custodial monitors and do not 'instruct' in any sense, in the majority of these group meetings." Accordingly, they dismiss the contention [Brief at 54-55; U.S. Brief at 28-30] that dispensing with a sponsor for the Christian Bible Club would substantially alter WHS' club program.

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[11] While Dr. Findley testfied that Peer Advocates was not directly related "to any of the required curricular or elective courses at WHS," [J.A. 231], he also explained that it was curriculum related because it was "another activity that would allow kids to become aware of how to work with others as service activity, something that our overall goals and mission would definitely endorse." [J.A. 232].

This argument, too, rests on a false factual premise. As found by the District Court, sponsors were required by WHS to actively supervise clubs. [App. Pet. B 22-23]. Because clubs foster student confidence and give students a greater opportunity to exercise leadership than is possible in the formal classroom setting, sponsors afford clubs substantial independence. [J.A. 239; 374-375]. Nevertheless, ultimate responsibility for ensuring that each club furthers the goals and mission of WHS and complied with the "balance" requirement remains with sponsors.[12]

That not all clubs had a sponsor present at all times, or that a few teachers took advantage of an opportunity

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12 Dr. Findley testified [J.A. 247-48]:

Q. [Are clubs] different from the classroom . . . where you have a teacher present all the time to monitor the

to be paid for not working, creates neither a constitutional limited public forum, Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983), nor a statutory one under the Act, which speaks

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discussion and the flow of the discussion . . .?

A. Right, and to make sure both sides are presented.

Q. So the club structure is different in that respect, right?

A. No. I would think it's the same. The sponsor has got a responsibility for the content and what takes place in the club or activity.

Q. But he is not always there to monitor that, right?

A. Can't always be there . . . . There is no way the sponsor could begin to meet . . . some of the time lines that young people set up to get ready for things . . . .

Q. So it is your testimony . . . that the sponsor . . . is there to monitor the speech that goes on in the club?

A. No, that's not my testimony. That person is there to make sure that club is organized and follows the organization that is pre-arranged and described to us, and I've got a trust in that individual that that is done.

of choices by a school, 20 U.S.C. §4071(b), not choices foisted upon it by the misfeasance of its employees.

II

THE STUDENTS' CONSTITUTIONAL CLAIMS ARE WITHOUT MERIT

A. Tinker and Healey Do Not Control This Case

The United States asserts that this case should be resolved solely on the basis of the Equal Access Act. [U.S. Brief at 14, n.15]. The students prefer that it be resolved on the free speech principles laid down in Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969) and Healy v. James, 408 U.S. 169 (1972).[13] [Students' Brief at 18, n. 22]. Neither case controls here.

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[13] The students raised a Free Exercise claim on which neither court below passed. Beyond an isolated sentence in a long footnote, they do not press that claim here. [Brief at 18, n. 24]. All courts faced with identical claims have rejected them. Brandon v. Bd. of Educ., 635 F.2d 971, 977-78 (2d

In Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562 (1988), this Court held Tinker inapplicable to speech, such as WHS' club program, which is, or might easily be mistaken to be, school sponsored speech. Healy v. James preceded the application of public forum analysis to access cases. And Healy involved viewpoint discrimination, 408 U.S. at 187, impermissible even in a nonpublic forum. As demonstrated in our Opening Brief at 53, n. 27, this is not a viewpoint discrimination case.

B. WHS' Rules Are Not Unconstitutionally Vague

The students assert that WHS' club policy is impermissibly vague. [Brief at

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Cir. 1980); Bender v. Williamsport Area School Dist., 563 F.Supp. 697, 701-03 (M.D. Pa. 1983), rev'd, 741 F.2d 538 (3d Cir. 1984) rev'd on other gds, 475 U.S. 534 (1986); Bell v. Little Axe Ind. School Dist., 766 F.2d 1391, 1400, n. 6 (10th Cir. 1985).

31-33]. Whatever vagueness exists is inherent in the concept of "curriculum" which is the basis of that policy. Neither the Act nor any party to this proceeding has succeeded in defining that term with any precision. Indeed, as the students' expert testified, educators have not agreed upon a uniform definition of "curriculum." The vagueness doctrine does not demand more precision than language is capable of providing. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

The students' vagueness argument is specious for other reasons. Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 864, 876, 889 (1983), holds that schools are free to convey points of view. In choosing a point of view schools need not be constrained by narrowly drawn rules, for, as this Court wrote in Hazelwood School

District v. Kuhlmeier, 108 S.Ct. 562, 571, n. 6: "[T]o require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate."

The students are correct [Brief at 23, n. 28] that WHS's "balance" requirement is an "unheard theory of law." Balance is a theory of education, not law; it is a theory fully consistent with the Constitution.

III

THE UNITED STATES' INTERPRETATION OF THE ACT PROMOTES UNCERTAINTY

The students' brief is less than lucid in its exegesis of the Act. The United States, by contrast, presents a comprehensible and not entirely implausible reading of the Act, with which we have two main points of difference:

(1) we think, but the United States disagrees, that the Act leaves the

definition of curriculum to school officials and that it does not require a "one-to-one" relationship [U.S. Brief at 28] with a specific course offering for a club to qualify as curriculum related; and

(2) we think, but the United States disagrees, that the Act should be interpreted to parallel Widmar and the public forum doctrine.

A. The Act Leaves the Definition of Curriculum to School Officials

1. Curriculum Should Not Be Defined By Reference to Popular Dictionaries

The Act does not define the triggering phrase "noncurriculum related," although it does have a definitional section. 20 U.S.C.§4072. The Court of Appeals attempted to fill this gap by looking to the legislative history for clubs cited as noncurricular. That unsatisfactory approach would include as noncurricular some clubs both Respondents

view as curricular. For example, Senator Mattingly thought math and science clubs,[14] and Representative Lloyd thought the debate club,[15] were noncurriculum related.

Respondents attempt to fill the gap by quoting different general-purpose English dictionaries. Each asserts that the popular meaning should be controlling. [Students' Brief at 36; U.S. Brief at 23].

The United States' definition of curriculum, found in Websters' New World Dictionary (2d College Ed. 1974), would limit the curriculum to a "fixed series of courses . . . required for graduation," [U.S. Brief at 23], apparently excluding clubs required as adjuncts to elective courses not required for graduation. According to the students'

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[14] 130 Cong. Rec. 19, 242.

[15] 130 Cong. Rec. 20, 941.

proferred definition, taken from Webster's Third International Dictionary Unabridged (1986), extracurricular means:

> of or relating to officially or semiofficially approved and organized student activities (athletics, dramatics, or publications of a school newspaper) connected with the student school and usually carrying no academic credit.

It is telling that each of the three examples cited in Websters Third as "extracurricular" (and many noncurriculum related activities under the United States' definition) is curricular for purposes of the Act. For example, neither Respondent now contends that WHS' drama club was not curriculum related. And in Hazelwood, a school newspaper was held to be part of a school's curriculum. 108 S.Ct. at 568-569.

Similarly, the legislative history could not be clearer that athletic

teams do not trigger the Act. 130 Cong. Rec. 19,223 (remarks of Senator Hatfield); 130 Cong. Rec. 20,942 (remarks of Rep. Goodling). Presumably few, if any, school districts in the country offer academic courses on football or basketball, yet most secondary schools have such teams. Under Respondents' dictionary definitions, these programs trigger the Act, a possibility Congress rejected.

It makes little sense to apply an imprecise popular definition to a technical term in a statute directed at professionals, for many of whom that term has a very different meaning. As the students' own expert admitted, [J.A. 406-408], a recognized body of educational thought defines curriculum in the same broad way as do officials at WHS.

A recent encyclopedia of education begins its definition of "curriculum" by

noting that it is "a complex term that has no agreed upon definition" and concludes "curriculum is more than just a program of studies or a sequence of courses to be followed by the student." E.L. Dejnozka & D.E. Koppel, American Educators' Encyclopedia, p. 141, s.v. Curriculum.[16]

The view of curriculum taken by WHS officials is not the only possible one. It is enough that it is a possible one. A flexible construction of ~~the~~ statute

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[16] The United States suggests [Brief at 29] that the explanations offered by school officials are ad hoc rationalizations, not "a guiding principle." What the United States fails to note is that the "Mission and Goals" of WHS [J.A. 473-478], which is the basis for the school officials' testimony, is a direct descendent of the pathbreaking report, Seven Cardinal Principles of Secondary Education, of the Commission on the Reorganization of Secondary Education (1918), the formative document of contemporary American secondary education. See W. Sybouts & W.J. Krepel, Student Activities in the Secondary School (1984) at 47; L.A. Kremin, American Education: The Metropolitan Experience: 1876-1980 (1988) at 232-233.

recognizes that there is no agreed upon definition of curriculum. While protecting students' rights, it also respects local control of education as Respondents' proposed definitions do not.

2. The Direct Relationship Between Course and Club Is Not To Be Rigidly Defined

In addition to defining curriculum in the narrowest possible academic terms, the United States would require a "one-to-one" relationship between a course and a club for that club to qualify as curriculum related. [U.S. Brief at 28].

The United States concedes that the legislative history is "not completely clear" and that there are "contrary indications in the legislative history." Nevertheless, it argues that "on balance," the legislative history reinforces the view that "the Act exempted from the "non-curriculum

related" category "only those clubs closely connected to courses offered by the school." [U.S. Brief at 23-24]. It argues that this reading of the history best fits the statute's definition of a "meeting" as an activity of a student group "not directly related" to the school curriculum. 20 U.S.C. §4072(3).

The United States' view artificially combines a speech in the House delivered by Representative Goodling, 130 Cong. Rec. 20,942, setting forth a two-part test for curriculum relatedness, and a colloquy in the Senate in which Senator Hatfield, chief Senate sponsor of the Act, described curriculum related clubs as "a kind of extension of the class-rooms."[17] 130 Cong. Rec. 19,223.

There are several things wrong with this position. First, it assumes that

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17 Perhaps the United States should also insist, as did Representative

the two tests are identical, a highly strained reading of both statements. Second, it makes Senator Hatfield's position in the colloquy internally inconsistent. Immediately after the remarks quoted by the United States, Senator Hatfield emphasized that no hard and fast rules could be laid down about whether a particular club -- a chess club was the example he used -- was or was not curriculum related because school boards, not Congress, define curriculum. That view was echoed by Representative Goodling. 130 Cong. Rec. 20,941.

Third, it reads Senator Hatfield's "extension of the classroom" remark too narrowly. Schools can extend the classroom in many ways, not only in the

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Goodling in the remarks quoted by the United States, that to be curriculum related, a school must "requir[e] or directly encourag[e] participation in such groups in connection with curriculum course work." Curiously, the United States ignores this requirement.

grudging, narrow and didactic fashion the United States insists the Act requires. Its definition puts educators into a straitjacket, and limits the curriculum to traditional subjects taught in traditional ways.

A school which wants to retain a closed forum, but also wants to create a club which would emphasize abstract skills used in several courses, or expose students to a new subject where there might not be enough interest to warrant offering a full-fledged class (or, as was the case with the WHS' Photography Club, [J.A. 444-445] some other reason prevents the conduct of a formal class), would be faced with a Hobson's choice not intended by Congress.

Finally, the United States assumes, contrary to the role schools must play in these days of AIDS, drug abuse, teen-age pregnancy and the breakdown of the

nuclear family, that it is enough for schools to pass on information, and that shaping attitudes, behavior, citizenship skills, and a host of other skills and values are all beyond the legitimate purview of the curriculum of the 20th century high school.[18] In fact, WHS' Mission and Goals statement [J.A. 473-478], reflecting these realities, charges the school with meeting these contemporary needs. Congress could have explicitly limited the schools to a narrower vision. But there is nothing to suggest that it took such a drastic step.

3. WHS' Definition of Curriculum Would Not Eviscerate The Act

It is simply not the case, as the United States charges, that WHS' definition of curriculum would eviscerate the

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[18] See J.S. Coleman, Families and Schools, 16 Educ. Research (June/July 1987) at 32-38; S.B. Heath & M.W. McLaughlin, A Child Resource Policy: Moving Beyond Dependence on School and Family, Phi Delta Kappan (March 1987).

Act. Plainly, sham assertions of curriculum relatedness are inadequate to avoid triggering the Act. Courts routinely scrutinize all sorts of claims to determine whether they are shams. They can do so here just as easily.

The United States' accusations are not backed up by any studies showing that schools are attempting en masse to evade the Act. On the contrary, the only reported study we could locate found that only five percent of schools have closed forums and would bar student religious clubs. Of schools actually receiving requests for such meetings, more than seventy percent granted them.[19]

Obviously, many districts narrowly define curriculum. Others serve as

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[19] American Association of School Administrators, Equal Access' Interpretation and Implementation Guidelines (n.d.). The study did not inquire into the reasons for denying access to religious clubs.

community centers where all manner of student groups are permitted because no other opportunity exists for adolescents to associate. Some few districts may wish to encourage religious speech, or not be seen as hampering it.

Moreover, although the United States roots its narrow reading of the Act in its plain language, it elsewhere concedes that the Act cannot be taken literally. Explaining the requirement that triggering clubs be "student initiated," 20 U.S.C. §4071(c), the United States [Brief at 23, n. 30] concedes that:

> those activities that are sponsored by a school as part of its administration or participation in the larger educational system -- presumably indicating activities like yearbook groups and participation in national contests

are curriculum related.

The United States appears to confuse the issue of curriculum-relatedness with

the different issue of student initiation. Be that as it may, Peer Advocates, as well as National Honor Society and student government, fall squarely within the United States' proposed exemption. A chess club would as well, if it participated in an inter-scholastic chess tournament.

And since there is no a priori reason why "national contests" are more related to the "administration" of the school than service clubs[20] or other national affiliations such as Zonta or Rotary, the United States' position is subject to the criticism that it create

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[20] WHS' insistence on inculcating in its students the importance of service to others as part of its "mission and goals" is hardly idiosyncratic. On the contrary, it has received widespread endorsement. See E.L. Boyer, Service: The New Carnegie Unit in High School in A Report on Secondary Education in America (1983) (ch. 12); B.F. Brown, New Directions for the Comprehensive High School (1972) (ch. 3).

an exception which would swallow up the Act -- the very charge it levels at our interpretation of "curriculum." Our definition, at least, has the redeeming virtue of leaving educational decisions to school officials.

B. The Act Should Be Interpreted In Tandem With Widmar v. Vincent

The United States rejects the District Court's holding that the "Act's applicability turns on whether or not the public secondary school has created a limited open forum." [U.S. Brief at 22, n. 29, quoting Pet. App. B. 14].[21] While agreeing that Widmar provides the backdrop for the Act, it argues that Congress went beyond Widmar in order to eliminate "confusion and uncertainty" in the law. [U.S. Brief 20-21]. In particular, it points to 20 U.S.C.

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21 The Court of Appeals agreed that the Act "codified the Supreme Court's decision in Widmar v. Vincent . . . ." [Pet. App. A. 15].

§4071(b) prescribing that a limited open forum exists whenever "one-or-more" non-curriculum related groups [are permitted] to meet . . . . (emphasis added).

According to the United States, [Brief at 28], this "one-or-more" language severs the relationship between the Act and Widmar's constitutionally based public forum. In fact, the phrase was intended to make clear that the school's mere assertion of a closed forum, when in practice it intended and has a limited forum, does not suffice to avoid triggering the Act. See Opening Brief at 66.

The position of the United States would come as a surprise to the many Senators who spoke after the author of the "one-or-more" language, Senator Leahy, explained it. Those Senators

explained that the Act simply extended Widmar to high schools.[22]

Moreover, it would be surprising for Congress, so emphatic in its reliance on Widmar, to have departed from Widmar in a way that raised questions left open in Widmar. In rejecting an Establishment Clause defense in Widmar, this Court emphasized that, in fact, there were a large number of clubs operating on campus. 454 U.S. at 275. It pointedly left open the question of whether a forum dominated by a religious group would pose a different question. Id. The United States invokes these very principles in urging the constitutionality of the

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22 See, e.g., 130 Cong. Rec. 19,223 (Senator Hatfield); Id. at 19,236 (Senator Levin); Id. at 19,237 (Senator Bumpers); Id. at 19,238 (Senator Durenberger); Id. at 19,239 (Senator Bidon); Id. at 19,242 (Senator Jepsen); id. at 19,243 (Senator Dole); See also Id. at 20,935 (Rep. Bonker).

application of the Act to this case. — [U.S. Brief at 46].[23]

Yet, paradoxically, the United States also urges a construction of the Act which could lead to a two group forum, one secular, one religious, with the latter dominating the forum -- for example, a school with just a five person chess club and a two hundred person Christian Bible Club. Under the United States' view, Congress took the bizarre step of creating a constitutional trap, based on the very decision which members of Congress thought served as a model for avoiding it.

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[23] The United States suggests that this aspect of Widmar is no longer good law because Mueller v. Allen, 463 U.S. 388, 401 (1983) held that constitutional law should not be made dependent on factual questions. The Court has not adhered to this view in subsequent Establishment Clause cases. Bowen v. Kendrick, 108 U.S. 2562 (1987); Allegheny County v. ACLU, 109 S.Ct. 3086 (1989).

Amici Burr suggests [Brief at 12] that our argument that the Act is to be interpreted in light of the constitutional forum doctrine is based on the mistaken equation of the term "limited public forum," the language of Widmar, with the term "limited open forum," used in the Act. If there a difference between an open and a public forum, amici do not state it. It is a difference which has eluded this Court as well, which uses the phrases interchangeably.[24] And it is a difference no member of Congress thought significant enough to explain.

[24] Widmar itself uses the public forum phraseology. Yet, in describing Widmar, this Court has referred to is as an open forum case. Hernandez v. C.I.R., 109 S.Ct. 2136, 2146 (1989) (describing Widmar as an "open" forum case); Bowen v. Kendrick, 108 S.Ct. 2562, 2585, n. 4 (1988) (Blackmun, J., dissenting) (same); Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562, 568 (1988) (describing Widmar as a public forum case); cf. Bender v. Williamsport Area School Dist., 475 U.S. 534, 552 (1986) (Burger, C.J. dissenting) (describing Widmar as "a forum generally open to student groups.")

IV

THE STUDENTS SEEK SCHOOL ENDORSEMENT OF THEIR RELIGIOUS ENDEAVOR

Respondents devote many pages to the facial constitutionality of the Act, an issue we do not raise in this Court. Rather, we argue only that, since all clubs at WHS are school sponsored, requiring WHS to recognize a Bible Club amounts to a demand for official sponsorship of religion.

The United States [Brief at 30] argues that this problem could be avoided if WHS waived its insistence on a sponsor for the Christian Bible Club. This, however, greatly oversimplifies the school's problems. First, the presence of a teacher sponsor is only one of the indicia of school sponsorship. So, for example, is access to the PA system or participation at Club Fair, rights the students have demanded. [J.A. 58, ¶13].

More importantly, the Act itself prohibits discrimination against "any student." (§4071(a)). Another section of the Act, §4071(c)(2), contemplates no discrimination between religious and other student clubs. A waiver of a faculty advisor in the case of religious clubs only could be viewed by student members of ideological clubs -- say, an anarchist's or libertarian's club -- as discrimination against them. Thus, unless the United States is urging the Court to ignore the Act's core non-discrimination principle, an affirmance would significantly alter WHS' club program.

CONCLUSION

When all is said and done, neither Respondent takes the Act literally. Each recognizes categories of clubs which, though "noncurricular," do not trigger the Act. The United States goes further

and recasts the Act to take into account what it obviously recognizes to be the legitimate concerns of school officials. Respondents' ad hoc exemptions do not provide school officials the sure guidance Congress contemplated.

If our approach is also not entirely free of difficulties, it allows for the fulfillment of the overall purpose of the Act, while leaving educational decisions where they belong, not with students or judges, but with school officials.

The judgment should be reversed.

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